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No. 84-310

IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF

ATTORNEY ROBERT J. SNYDER.

AMICUS CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, INC.

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INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a national organization with a membership of over 2,500 lawyers representing every state in the nation. Every member devotes a substantial portion of his or her time to the practice of criminal law which results in daily contact with the criminal justice system as an advocate, professor of law, or judge in the state and federal courts.

The NACDL is the only organization wholly dedicated to the advancement of the interests of the criminal defense bar. Among its objectives is the promotion of improvements in the administration of the criminal justice system.

Amicus submits this brief because we are concerned that our constitutional rights, as guaranteed under the First Amendment, are under jeopardy if the ruling of the Eighth Circuit is upheld. In addition, Amicus is interested in learning the standard to be applied to communications directed to the staff of a court by an attorney when those communications are not made in open court nor published by the press. The decision of the Eighth Circuit Court of Appeals in the above-entitled matter is not very helpful in elucidating the standard to be applied in such situations.

It is well settled that a court has the right and the power to maintain order in proceedings brought before it. Indeed, the proper administration of justice requires that the court proceed in an orderly fashion to ensure fairness to all litigants. However, coupled with the power to compel order in the courtroom, it is the obligation to use that power with restraint. In the past, it has been used only in circumstances which clearly demonstrated that the administration of justice would be immediately impeded. Most observers would agree that criticism of the criminal justice system as a whole concerning perceived shortcomings within it is not tantamount to condemnation of the principles on which it stands. Hence, the Eighth Circuit's use of its power to suspend ROBERT

J. SNYDER for voicing a complaint that many practitioners, including Amicus, have recognized is inappropriate when used to reprimand a real or imagined, personal affront on the court.

The "contumacious" conduct with which the Eighth Circuit took exception involved criticism of the Criminal Justice Act (CJA) and its procedures. Amicus routinely handles cases under the auspices of the CJA and like petitioner SNYDER believes that reforms in the Act are long overdue. We note that the Congress in enacting the Comprehensive Crime Control Act of 1984 revised the Criminal Justice Act, at least in part, because of complaints brought by attorneys such as petitioner SNYDER. We do not mean to suggest that unbridled criticism of the judicial system should go unpunished when the very precepts underpinning the judicial system are threatened with clear and imminent obstruction. However, the criticism vented by the petitioner was innocuous and resulted in no incapacitation of the court's ability to carry out its judicial functions.

Finally, Amicus would point out that the decision *In the Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (1984), has had a profound effect upon all members of the legal community and not just the criminal defense bar. The "signal" sent to every practicing attorney by this decision is that hyperextreme care must be taken whenever any communication is directed to the court, including its staff. To do otherwise could result in suspension from the practice of one's profession.

Amicus believes that this has a "chilling effect" on all members of the Bar and is unjustified. The panel of the Eighth Circuit, before whom petitioner appeared, opined that "without public display of respect for the judiciary . . . the law cannot survive." Yet, this High Court recognized the shortcomings of that, by now discredited, view that criticism of the judicial system would result in its collapse. *United States v. Grace*, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

Amicus believes that our views coincide with those of Mr. Chief Justice Warren Burger in that the legal profession as a whole must work to change the public's perception that we are a "closed guild" and incapable of self-criticism. Accordingly, Amicus prays that this Court quash the order suspending petitioner, Attorney ROBERT J. SNYDER, issued by the Eighth Circuit Court of Appeals.

ARGUMENT

THE CORRESPONDENCE SENT TO THE SECRETARY OF THE LOWER COURT WAS NOT DISRESPECTFUL ON ITS FACE.

The Court of Appeals' order of suspension was based upon the petitioner's refusal to apologize for certain language used in a letter sent to the secretary of Judge Bruce Van Sickle. In the view of that Court, this refusal to apologize was deemed disrespectful and constituted "contumacious" conduct by the petitioner.

However, the Court of Appeals failed to establish by what standard it concluded that the language of the letter was disrespectful. The Court simply stated that "the letter speaks for itself." Order Denying Petition for Rehearing En Banc, filed May 31, 1984, page 6. The Model Rules of Professional Responsibility, as adopted by North Dakota, also do not set forth the standards by which an attorney can be adjudged disrespectful to a court mandating that sanctions be applied against him. Consequently, petitioner and Amicus do not know what constitutes disrespectful language when it is not defined. Such a amorphus standard lends itself to arbitrary application and concomitant abuse of power. This is best illustrated by the case now before the Court.

In the past, the standard which was applied to communications directed to the Court in proceedings brought before it, was

whether that statement impugned the honesty or competency of that tribunal. Thus, an attorney who accused all local courts of "crookedness" and "incompetence," such accusation being reported by the press, was properly subject to sanctions. *In the Matter of Lacey*, 283 N.W.2d 250 (1979).

Similarly, public statements made by an attorney accusing the courts of active misconduct in the prosecution of a matter involving that attorney were held to be disrespectful and merited the application of sanctions. *Florida Bar v. Weinberger*, 397 So.2d 661 (1981).

Certainly statements which have the effect of disrupting a judicial proceeding have an extremely high risk of imminently obstructing the fair administration of justice and warrant sanctions. *Pennekamp v. Florida*, 328 U.S. 331 (1946). *Bridges v. California*, 314 U.S. 352 (1941). In addition, the cases cited by the Court of Appeals *In the Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (8th Cir. 1984) also stand for the proposition that when the administration of justice is immediately imperiled or held up to public scorn, sanctions are appropriate.

After careful consideration of the entire body of law relating to the difficult question now before the Court, Amicus posits that the real focus of inquiry by the courts has been on the likely effect that the statements would have on future litigants. If the statements undermine public confidence in the fair and impartial application of the law by the courts, then sanctions should be applied. On the other hand, if the statements, when fairly construed, do not evidence any impairment of the judicial function, then despite their "tactlessness," the statements do not warrant the application of sanctions.

The petitioner criticized the procedures of the CJA, but did not accuse the court of being either unethical or corrupt. It is axiomatic that the danger in permitting an accusation of corruption to go unpunished is that an order from a court perceived as

corrupt will not be obeyed. Since a court must rely on the assumption that its orders will be obeyed without significant resistance, its ability to function will be impaired in only those situations in which its very legitimacy is challenged. Since the petitioner made no such accusation, the order suspending him should be quashed because there has been no showing that there is any danger that an order issued by courts of the Eighth Circuit will not be obeyed.

An examination of the standard which has been applied in cases involving the contempt power of a court illustrates by analogy the inapplicability of sanctions in the instant case.

In order for contempt of court to properly lie, there must be an immediate or imminent interference with the functions of a court. *In Re McConnell*, 370 U.S. 230 (1962). The focus of the standard applied in contempt cases is interference with functions of the court which are judicial in nature.

Our experience teaches us that our system of resolving disputes necessarily involves friction and exchanges between advocates of opposing view points. The process is adversarial and at times passionate rhetoric is voiced before the censor of the mind can intervene. Despite the vehemence of the language, however, the court must refrain from reprisals directed at the utterer unless and until the functions of the court are actually impeded. Vehemence of language is not the test, but only a factor to consider. *Craig v. Harney*, 331 U.S. 367 (1947).

SUMMARY

In summary, the policy considerations underpinning the contempt power are virtually identical to those underlying the power of a court to order sanctions for disrespect directed to it. The complained-of statements must be of the variety that imminently and immediately impair the administration of justice. The letter and the statements therein fall short of this standard.

Our judicial system is not nearly so fragile as the Court of Appeals evidently believes. Two centuries of experience have demonstrated that our legal and political institutions can endure criticism and, indeed, become more robust for the reproof having been made.

The statements made by petitioner respecting the inadequacies of the CJA are shared by many Amicus. It is unfortunate that the issues raised in petitioner's letter did not receive the attention that they deserved simply because of the questionable taste in which they were cast. Nevertheless, Amicus prays that the order suspending the petitioner be lifted because it is an unjustified abridgment of petitioner's right to bring a problem of national importance to the attention of the courts.

Dated: December 17, 1984

Respectfully submitted,

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